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DICTA

Vol. X APRIL, 1933 No. 6

Dicta Observes

In Massachusetts the legal profession is "viewing with alarm" the possibility that because of the unjustifiable expense of jury trials, motor tort litigation may be taken away from them as were workmen's compensation cases.

Advance of Medicine vs. Law

Of the two leading professions of the country, law and medicine, the statement is made that the practice of medicine has made revolutionary advances within this last century but that no such meritorious claim can be made by the legal profession. On the evening of the radio address by Dean Pound, a physician also gave a talk on yellow fever and its frequent recurrence in this country prior to 1900; that in 1900 as a result of heroic scientific experiments it was definitely determined that yellow fever was transmitted by only one agent, the mosquito, and by only one species of that insect, and that since that year the menace of yellow fever has disappeared. Reference is made to the increasing efficacy of treatment of other diseases, tuberculosis among them.

Contrasting the work of the medical profession it is said that the legal profession has almost stood still because it continues to look askance at scientific methods of approach to legal problems, particularly court procedure, although an eminent western lawyer has expressed himself as believing that a change is coming over the members of the bar and that they are gradually beginning to see that the conservative attitude heretofore taken is actually depressing the cause of justice.

In Memoriam

Felix B. Tait, one of the oldest members of the Colorado Bar, passed away on March 17, 1933.

FORCED CONFESSIONS.

By George L. Longfellow, Jr., of the Denver Bar

WHILE the press and the public are criticizing and defending the use of the "third degree," or "shellacking" of persons accused of crime, and the Florida "sweat-box" case and the New York "fractured larynx" case of police brutality resulting in death of the victims are brought vividly to our attention, it is interesting to consider the matter with reference to the trustworthiness of confessions obtained by such methods.

The use of such methods is obviously in violation of the constitutional provision that no person shall be compelled, in any criminal case, to be a witness against himself. An editorial in a current magazine abhors the existence of this constitutional rule, contending that it shields the criminal. On the other hand, many opponents of the third degree abhor violations of the rule on the ground that such violations are in breach of public faith or of the rules of fair play.

We should remember, however, that criminal procedure is not a game, that the rules are not to be observed for the sake of good sportsmanship alone, and that the constitutional guarantees exist, not to shield the guilty, but to protect the innocent against forced and untruthful admissions of guilt. The real reason for the constitutional guarantee and for the rule of evidence excluding confessions so obtained is that experience has shown that no reliance can be placed upon such confessions. This is for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them. "It is a mistaken notion," stated Nares, J., in Warickshall's Case, decided in England in 1783, "that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith. . . Confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit." Said Williams, J., in R. v. Mansfield, 14 Cox Cr. 639, "It is not because the law is afraid of having truth elicited that these confessions are excluded, but because the law is jealous of not having the truth." Wigmore, in his treatise on Evidence, states, "The

principle upon which a confession is treated as inadmissible is that under certain conditions it becomes untrustworthy as testimony." Experience, he says, has shown that "under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence. . . The principle then, upon which a confession may be excluded is that it is, under certain conditions, testimonially untrustworthy."

The peculiar trustworthiness of a confession as evidence of guilt lies in the natural presumption that such words would never be uttered by an innocent man in possession of his senses. While it may be presumed that an innocent man would not voluntarily declare himself to be guilty of a crime —and it is this presumption which gives a confession its value as evidence—many substantial inducements can be offered him for such a confession; such, for example, as the presence of a 200-pound officer standing erect upon the victim's torso, one heavily booted foot upon his Adam's apple and the other upon his abdomen, both feet jouncing jerkily up and down (See Literary Digest July 30, 1932.) We can easily conceive of a "confession" being gasped between spasms by an innocent man in such a predicament, provided he is able so to gasp. We can also conceive of a confession being obtained under much less spectacular circumstances, such, for example, as well directed and persistent blows, relentless ordeals of questioning conducted at all hours of night, and confinement in "the hole," (a dark, steel cell in the Denver City Jail, without bed, light, or water) for an indefinite period of time. But a confession so obtained is of no evidentiary value and should be excluded, as it obviously was not made because of a desire to tell the truth, but because of other inducements. Only by falsifying concerning the circumstances under which such a confession was obtained (a practice which is all too common) can it be used in evidence.

If, then, a confession obtained by means of threats and abuse is of doubtful trustworthiness, what justification exists

for the use of the third degree? To say that it is justified because the victim, having committed a vile or atrocious crime, only "got what he deserved," is to beg the question, for such reasoning commences with the presumption that the accused is guilty, and that the officers, therefore, are entitled to take the law into their own hands. To arrive at such presumption, the arresting officers must first constitute themselves a preliminary tribunal to pass upon the weight of the evidence, and thereupon may proceed to punish the accused before he has been accorded a trial by his peers. The fairness and impartiality of such a tribunal may well be doubted, as well as the judicial temperament and ability of such self-appointed "judges." A peculiar inconsistency on the part of the law enforcers who resort to this method is that they place great reliance upon a confession obtained in this manner as proof of the guilt of the confessor, but they place no credence whatsoever in the previous repeated denials of guilt as evidence of innocence of the accused. Such denials are never preserved in the police records, and a prisoner who persists in making them is invariably regarded as a stubborn and hardened criminal. In the famous "fractured larynx" case an assistant District Attorney quotes and describes the 200-pound officer as follows:

LITERARY DIGEST, *July 30, 1932, at Page 3:*

"I put one foot on his neck and one foot on his belly, and rocked back and forth. But I couldn't affect him! He's the toughest I ever saw!"

Mopping his brow, very hot and exhausted, a 200-pound police officer of Nassau County, Long Island, made this complaint to the young assistant district attorney, according to the testimony of the latter, subsequently reported in the newspapers.

Below-stairs, the prisoner, young Hyman Stark, was struggling for breath. Four hours later, removed finally to a hospital, this latest victim of the "third degree" perished of "asphyxia as a result of the fracture of the larynx."

During the "shellacking" (the police prefer this term, newspaper accounts assure us, to the ordinary term of "third degree"), the victim had been beaten, according to an autopsy, "with a smooth rubber hose and a piece of corrugated hose."

The conduct in that case appears to be an "improvement" on the ancient method of trial by wager of battle, for in that form of trial the accused was assured of an acquittal in case

he survived, whereas in the modern practice of the third degree, he is assured only of the doubtful glory of a reputation as a desperate and hardened criminal.

Furthermore, in case the evidence of guilt is so overwhelming as to leave no reasonable doubt as to the guilt of the accused, it is fair to say that a confession is not needed, for an admission on the part of the accused would, in such a case, be superfluous. But the third degree is usually resorted to when competent evidence of guilt is lacking. Its use usually is an admission on the part of the officers of the weakness of the case against the prisoner. It is generally asserted that the more efficient police departments are eliminating use of the third degree. In England the third degree is not resorted to and the accused often is not even questioned. The reason, no doubt, is that efficient police departments are able to trace the evidence, whereas the lazy and inefficient officer, unable to track the proof, but hoping that he has caught the criminal or someone else who will do as well, proceeds to "persuade" the prisoner to relieve him of his task by admitting that "the jig is up." Where the evidence is so shaky as to lead to the use of the third degree as a last resort, can anyone say that the prisoner "got what he deserved" because he committed the crime? Who has right to say with authority that he did commit the crime? Certainly not the detectives who cannot locate the evidence. And certainly not the newspapers, whose reporters know even less about the case than do the detectives.

It is obvious that the third degree should be abolished, not only for the purposes of fair play, but even more for the reasons that confessions obtained in this manner are valueless in the search for truth, and that the use of the third degree is an admission of inefficiency.

March 13, 1933.

Mr. Louis A. Hellerstein,
Editor-in-Chief, Dicta,
1020 University Building,
Denver, Colorado.

DEAR SIR:

I respectfully submit the following for "Dicta Observers."

HISTORY REPEATS
"CONSULT YOUR ~~BANKER~~ LAWYER"

Yours truly,

R. W. MCCRILLIS.

ADDRESS BY HONORABLE GEORGE F. DUNKLEE

At the Opening of the January Term, 1933, January 10, 1933

Honorable Judges, Ladies, Gentlemen and Members of the Bar:

AS THE retiring Presiding Judge of this court, it was thought wise by the committee that I say a few words before turning over the proceedings to the new Presiding Judge who will have charge of the ceremonies. In a way we are here to dedicate this new building. It marks an epoch from the old court house to the new court house. We that are here today can see all that we see of the City and County of Denver, but how many can look back fifty years and see in a slight degree Colorado or Denver as it was? Fifty years ago last March I left the state of Vermont for the West, as many others were doing at that time. We had all read what Horace Greeley said about going West, young man, and at that time there was one of our native sons, Horace A. W. Tabor, who was raised in Holland, Vermont, a little town within a few miles of where I was raised, who had gone into Leadville in 1860, and in 1879, as we all well know, had struck those rich mines that advertised his name, Leadville and Colorado in every household throughout the nation, and particularly throughout Vermont; so many of us who were seeking new homes started our journey westward. In March, 1882, I arrived in Trinidad. One of the first persons I met was the now Judge Arthur C. McChesney, then a young lawyer from Missouri, who had just shortly before that arrived and opened a law office. I was then interested in law; I had studied law some, but was not admitted, and wondering what I would do in this new Colorado, so I called on him. Judge Gunter had just arrived in Trinidad. I can see him now, a young man just starting in the law business with John M. Johns. I also made the acquaintance of the Superintendent of Schools because in Vermont I had taught school and I did not know whether I would in the near future be in the law business or in the teaching business, so I met John M. Jones, who was one of the school trustees in Trinidad, and Dr. Beshoar, and Dan Taylor—and what a history Dan

Taylor had—a fine man, a prosperous real estate owner, banker, cattleman and statesman; he was a member of the legislature when it met at Golden, and when the question came up as to whether Denver should be the capital or some other place he cast the deciding vote and the capital came to Denver. Then up on the mountainside was Uncle Dick Wooten, who had the toll gate. He was the first man to open a store in Denver, down where the old city hall is, and was a very interesting character; he had written a book and knew more of the early history of Colorado and the West, perhaps, than any other man then living. I talked to him about the early days and about the Indians. He had a son, Richard Wooten, in the insurance business, and who was a member of the legislature. In looking around to determine what to do, some of my friends suggested it would be a good thing to go out and file upon some coal land out in the direction of Starkville, and I filed on 160 acres, not knowing whether it would be worth very much or what would become of it; there was land everywhere; you could pick out Government land or coal land or anything else you wanted: it was just simply a question of making inquiry and locating and taking out the papers. I soon went over to Raton, New Mexico, and that was a newer country still. Indians were still coming in. The Santa Fe trains were just running through to California and it seemed strange to see between every two passenger cars an armed guard with two six-shooters and a Winchester, who rode the train clear through to California. How well I remember the riots that took place when the land grant officials started to eject O. P. McMains from his ranch, when the cowboys and cattlemen came in a thousand strong, and, of course, no sale or ejectment could be had. Then at Raton a man by the name of Metzel had had some trouble with a constable and he shot him. The mayor of the town came out, the justice of the peace, and they started to arrest him and in almost less time than it takes me to tell it five men were shot —I might say killed immediately—and a trial was had in five minutes, a motion was put as to what should be done, it was ordered that he be hanged, and he was hanged in front of the Raton bank. Then notice went out that if anybody objected to it they could get out of town. I frequently went back to

Trinidad, and after a short length of time I heard that the Santa Fe Railroad Company, or the Starkville Coal Company, which was the same thing, would like the coal land. I came up to Pueblo and first met attorney Charles Gast, who made out the papers, and sold my coal land, and with that I had sufficient to come to Denver.

What a beautiful country this was at that time—different, perhaps, than now; it seems to me that the air was clearer; it seems to me we could see farther; it seems to me that the men were stronger and that there was greater vitality and greater movement. I do not recollect of seeing anybody that was really poor or anyone passing the hat. You could hear that this one had taken up land, that that one had found a mine, that another one had done something else, but everything was moving in the right direction for prosperity.

I first went to the law office of John Q. Charles, and through him I saw things as they were for years before I came. He left Iowa in 1849 and went through this country when there was scarcely a single white person except those that had located in Utah, the Mormons. He went near Sutters Ford and went to mining, and strange as it may seem to some of you now he took out thousands of dollars with his own hands, shoveling it through sluice boxes, and went back to Iowa with a fortune which he deemed sufficient, but in 1859, as he told me, he commenced to hear rumors about what had taken place in Colorado, and in the early sixties he could stand it no longer and he sold out and came to Denver. He bought six lots at the corner of 15th and Curtis streets, built a house, and started in the law business; Denver grew, and it was not long before he moved that frame building up to 11th and Broadway, built the Charles block, and just a short time after he landed here he went out on what is now East Colfax avenue and filed on 160 acres of land, and while I was with him he sold it to the Chamberlains for one hundred thousand dollars. It seems to me that men got rich with the least effort in those days than anything I ever heard of. There are rich men today, but very few ever made the amount that many that I knew at that time did.

Subsequently I went up to the court house, which was new at that time. It seems to me, and I believe it was, the

finest building that existed between the Missouri river and San Francisco, a beautiful place, situated out in the then residence district among the trees. How well I remember Judge Elliott, the first judge, and Judge Steele, who was then Clerk for Judge Herrington, and all those oldtimers that have now passed on. When I left that old court house on the 27th day of December my mind ran back to almost a lifetime of activity in that court house as a lawyer, as county attorney and as Judge, and it was with deep sadness that I left a place that I had known and worked in so long. Above its dome there stood the Goddess of Justice, the scales had fallen through the rust of time, and over the door where we entered that Latin phrase, "Dedicata Justicia," and when I came to this building, beautiful palace that it is, I missed those mottoes; nothing of the kind was engraved upon its walls or stood upon its dome; but when the hour of twelve came I heard the beautiful tones of the Westminster chimes, donated to us by Mrs. Robert W. Speer in memory of her late husband, Mayor Robert W. Speer, and, as the bell pealed out those tones by every stroke of the hammer I thought of the little prayer that they say:

"Lord, through this hour,
Be Thou our guide;
So through Thy power,
No foot shall slide."

SOME NEW AND AMENDED RULES OF THE SUPREME COURT

The Supreme Court recently adopted some new and amended rules, effective May first, next. The principal changes are: In addition to the other requirements, the briefs shall have a subject index, and list of text and reference books and statutes alphabetically arranged.

The time for filing abstract and opening brief remains the same, while the answer brief is due thirty days *after service of copies,* and the reply brief is due twenty days *after service of copies.*

As to oral arguments: When desired, a separate written request therefor must be filed within fifteen days after the case is at issue. It is not sufficient to merely make the request in the printed brief.

Copies of these amendments may be had from the Clerk of the District Court or the Clerk of the Supreme Court.

SUPREME COURT LIBRARY

Miss Mary F. Lathrop, distinguished First Lady of National and State Bar Associations, and former Vice-President of the latter, has very kindly and generously donated to the Supreme Court Library the following:

"Memorial Volume, containing a Permanent Record of the Visit of the American Bar Association to England, Scotland and Ireland, 1924;"

"Memorial Volume, Recording the Visit of the Members of the American Bar Association to France, 1924;"

A photograph of the joint meeting of the American and British Lawyers at Westminster Hall, London, England, 1924.

A photograph taken at the dedication of the new United States Supreme Court Building, October, 1932;

Pictures of dignitaries of the American, British and French Bar Associations; letters and printed records relating to the annual meetings of the American Bar Association;

A paper weight, owned by Daniel Webster, and which adorned his desk in the United States Senate. It was given by Webster to Senator F. T. Frelinghuysen, of New Jersey, who gave it to Junius Van Vechten. Mr. Van Vechten gave it to Miss Lathrop. This historical relic is on display in the exhibition case at the library.

Mr. Stephen W. Ryan, of the Denver Bar, very kindly gave the library an important early Colorado publication, as follows:

"Reports of the Territorial Officers of the Territory of Colorado for the two years ending December 31, 1871, embracing that of the Treasurer, Auditor, Commissioner, Assayer and Librarian."

CURRENT BOOKS RECEIVED

Law Reports of England, 1932,
Decisions of the Comptroller General of the U. S., Vol. 11,
Kulp's Pennsylvania Reports, 11 vols.,
N. Y. Digest (Abbott) 1932 Supplement,
Idaho Codes, Annotated, 1932, 4 vols.,
Constitution and Statutes of La. 1932, 4 vols.,
I. C. C. Reports, vol. 181.

BAR ASSOCIATION PROGRAMS ATTRACT LARGE AUDIENCE

Widespread interest in the American Bar Association series of radio programs, "The Lawyer and the Public," has been shown by the public at large as well as by members of the bar. An interesting feature of the series, in which many of the most prominent members of the profession are taking part, is a question and answer period under the direction of John Kirkland Clark, of New York, Chairman of the Bar Association's Section of Legal Education and Admissions to the Bar. The varied questions from listeners throughout the country which Mr. Clark is called upon to answer every week show great interest on the part of intelligent laymen regarding education for the law, admission to the bar, and the part of lawyers generally in legal reform.

More than seventy stations of the Columbia network have signed up for the program. This is the largest hookup ever used in a series given under the auspices of the National Advisory Council on Radio in Education, which is sponsoring these programs in cooperation with the American Bar Association. One hundred fifty thousand copies of the program have been distributed, and as a result of popular demand the broadcasts are being reprinted in full, and may be obtained, either individually or in the entire set of fifteen, from the University of Chicago Press.

The series was inaugurated on February 12th by President Clarence E. Martin, of the American Bar Association, and will continue until May 21st. The programs are broadcast at 6 P. M. Eastern Standard Time through April 23rd, and Eastern Daylight Saving Time, beginning April 30th. The remaining speakers and their subjects are as follows:

April 2—Guy A. Thompson, former President of the American Bar Association, "What Is the Bar Doing to Improve the Administration of Justice?"

April 9—Henry W. Toll, Managing Director The American Legislator's Association, and Professor Edson R. Sunderland, of the University of Michigan, "Reforming the Law Through Legislation."

April 16—Philip J. Wickser, Secretary of the New York Board of Law Examiners; Theodore Francis Green, Governor of Rhode Island; and Robert T. McCracken, Chairman of the Philadelphia County Board of Law Examiners, "Hurdles in the Path of a Candidate for Admission to the Bar—a Round Table Discussion."

April 23—Newton D. Baker, former Secretary of War, President of the American Judicature Society, "The Lawyer Looks at His Responsibilities."

April 30—Professor Karl N. Llewellyn, of the Columbia University Law School; Professor Walter Wheeler Cook, of the Institute of Law of Johns Hopkins University; and Jerome Frank, of the Yale Law School, "How the Law Functions."

May 7—George W. Wickersham, President of the American Law Institute, "Restating the Law: An Attempt at Simplification."

May 14—Judge Learned Hand, of th U. S. Circuit Court of Appeals; Felix Frankfurter, of the Harvard Law School, "How Far is a Judge Free in Rendering a Decision?"

May 21—John W. Davis, former Ambassador to Great Britain, former Solicitor General of the United States, former President of the American Bar Association, "Selecting Judges."

LOST SINCE 1932

The library of the Second Judicial District reports the loss of volumes 30 and 46 Law Edition of the Supreme Court Reports. The Lawyers are requested to please search their libraries for the same, and if found return to the library.

One of our prominent jurists related the following story recently at a civic club luncheon.

A young Chinese student at an eastern university was asked if there was a Chinese equivalent for our proverb, "Penny wise, pound foolish." He stated he would study Chinese lore and let his questioner know. After some months the questioner received the following:

"Dear Friend: I find among the works of Confucius the saying, 'If you go to bed early to save the candle, maybe you get twins'."

Dictaphun

JUST AN ECHO IN THE VALLEY

Harry C. Green, Esq., laments that the fervent prayer of Rees D. Rees, Esq., in his poem "Our New Municipal Building" (10 DICTA 100) was destined never to be answered. Mr. Rees, it will be recalled, asked that

"Never, there, may an echo rise."

While Mr. Green is of opinion that "Echoes are about all there are to the depressingly grand court rooms."

LAW IS A MATTER OF GEOGRAPHY

A Boston barrister, somewhat hazy as to the extent and magnitude of the Great American Desert, wrote to a Denver lawyer inquiring for rates on a snappy Nevada separation. The Denver lawyer referred him to a Reno practitioner and the latter communicated his gratitude to the former (omitting salutations) as follows:

"Thanks very much for your letter of the 9th inst.

"I wrote to Mr. Cabotlowell telling him of your letter to me, and lamenting the domestic discord in Boston. The cause intimated in the letter you enclosed, to-wit: That both parties thereto desired to try it again with different partners, is ample cause and grounds for divorce under the laws of this noble state. However, it might be wise to allege different grounds in the complaint.

"This morning I received a wire from Mr. Cabotlowell asking me if I would take the case for $150 and costs, and if so the plaintiff would leave Boston Thursday. I remembered your expression of 'parlous' times and replied that the one-fifty was satisfactory but couldn't the client leave before Thursday."

ATTEMPT TO DECEIVE SUPREME COURT THWARTED

A member of the Supreme Court (not a Democrat) told the Librarian of the Supreme Court who told us that in a recent oral argument an attorney, in a tone calculated to melt the heart of a block of Cotopaxi granite, exclaimed:

"Why, if your honors please, this transaction has been like a millstone eating out the vitals of my client!"

WHAT! NO CUSTOMERS?

"The forbears had all been pioneers— . . . the uncle is building up a large and reputable mercantile business by the sheer force of his own personality."

—William H. Robinson, Jr.: *Amos Steck*, 10 DICTA 132, 133.

THE TWENTY-NINTH GENERAL ASSEMBLY WILL NOW COME TO ORDER

While examining into the constitutionality (from a legal viewpoint only) of 3.2% beer, Kenneth M. Wormwood, Esq., fastened upon this irrefutable authority:

"Men have been getting drunk ever since Noah celebrated the subsidence of the flood. The ancient Germans, from whom the Anglo-Saxon race sprung, used to propose their laws in their legislature while drunk and consider their passage while sober. And it is suspected by some that their descendants propose laws in legislatures of the present day while in the same condition, though their enactment may not be considered while sober, as by their ancestors."

—*Texarkana Ry. Co. v. Frugia*, 43 Tex. Civ. App. 48.

WOE! WOE!! WOE!!!

It is a source of deepest regret to us that an eminent Denver counselor reads the *Albany Law Journal*. For if he did not we should not have to suffer what appears in print below. Says this lawyer: "Dear Ben: Think this little effusion deserves a place in Dictaphun. Don't mention me." We only wish we could be as anonymous. In fact our story is going to be that the Editor-in-Chief forced us to print it.

FAUX-PAS

There was a litle lawyer man
  Who meekly smiled as he began
Her poor dead husband's will to scan.
He smiled as he thought of his fee
  Then said to her so tenderly,
You have a nice fat legacy.
Next morn when he lay on his bed
  With plasters on his broken head
He wondered what on earth he'd said.

—*Albany Law Journal.*

WE CAN THINK OF PLENTY

Under the heading "Moaning at the Bar" the esteemed *Colorado Graphic* remarks:

"The Publishers of the Colorado Law Alumni directory are anxious to have any mistakes called to their attention. . . . If you see a place where a change should be made please call William H. Robinson, Jr. . . ."

Supreme Court Decisions

QUIET TITLE—MECHANICS' LIENS—CONFLICTING RIGHTS OF LIENORS—*Stark Lumber Co. vs. Keystone Investment Co.*—No. 13129—*Decided February 14, 1933*—*Opinion by Mr. Justice Hilliard.*

This is an action by Keystone Investment Company to quiet title against defendants below who claimed title by virtue of a decree in foreclosure of mechanics' liens. One Bills owned the real estate upon which he gave a first and second trust deed and second trust deed was assigned to Oliver W. Toll and Toll assigned the second note and trust deed to Keystone Investment Company, who was not a party to that foreclosure suit, and five days before the commencement of this action, Keystone Investment Company demanded foreclosure of the second deed of trust and four days before the commencement of this action, the Public Trustee filed and recorded notice thereof, the foreclosure proceeding continuing, culminating in a trustee's deed to Keystone Investment Company. Five days thereafter, Stark Lumber Company commenced foreclosure of their mechanics' liens but failed to make Keystone Investment Company a party.

1. The fact that Oliver W. Toll, who is an attorney, actively participated in the lien trials and the further fact of his ownership of practically all of the capital stock of Keystone Investment Company does not postpone the title of the corporation, Keystone Investment Company, to the liens established in the foreclosure decree.

2. The recording of the election and demand for sale by the Keystone Investment Company was constructive notice that the company claimed an interest in the property which the lien claimants could ignore only at their peril.

3. The lien law gives claimants in the situation of the defendants below six months from the time of the completion of the improvements within which to institute foreclosure, but if action be not brought within such time, the lien is lost.

4. Considering that constructively the lienors were bound to note the claim of Keystone Investment Company five days before they filed their complaint, we do not think it may be said that they were misled, deceived or lulled to their undoing.

5. Having failed to make the Keystone Investment Company a party after notice of its claim, Keystone Investment Company would not be precluded from asserting its rights in an action to quiet title.

6. The Keystone Investment Company, having acquired legal title to the property in question, and being in possession and not bound by the lien foreclosure decree not being a party to said action, brought a timely action to quiet its title, and the decree of the court below quieting title in it was right.—*Judgment affirmed.*

FIRE INSURANCE—OWNERSHIP OF PROPERTY—WATCHMAN CLAUSE —MANUFACTURING ESTABLISHMENT—*Northwestern Fire & Marine Insurance Co. vs. Glass*—No. 12742—*Decided February 14, 1933—Opinion by Mr. Justice Burke.*

The Company issued a fire insurance policy for $2,000 on a building and mining machinery therein. There was a loss and on the verdict of a jury, Glass had judgment for $1,725.

1. Where a fire insurance policy was issued to "Kid Placer Mine," but the suit for loss was brought by Glass, and the evidence showed that he was operating the Kid Placer Mine and owned the building and machinery and that the agent who wrote the policy knew all the facts, there was not such a discrepancy as would void the policy.

2. The interest of Glass in the property insured was such that the loss fell upon him and the same is supported by the evidence. This constitutes sufficient proof of ownership.

3. Where the policy contained a watchman clause, but the parts of the plant over which the watchman clause applied was never filled in, there was nothing to which the clause could apply.

4. The policy recited that it should be void if the subject of insurance should be a manufacturing plant, and so forth. This being a placer mine, such a clause could not apply.—*Judgment affirmed.*

ADVERSE POSSESSION—LOCATION OF SECTION LINE—PLEADING—WITNESSES—INSTRUCTIONS—*Burns vs. Landreth*—No. 12748—*Decided February 6, 1933—Opinion by Mr. Justice Moore.*

1. In an action involving the ownership of land by adverse possession, an allegation in the answer should not be stricken which directly puts in issue the question of ownership.

2. Testimony of qualified witnesses, as to the true location of a section line, is admissible when the location of such line is in dispute, since in such a case the true location is to be determined by the jury as a question of fact.

3. Instruction as to adverse possession approved.—*Judgment affirmed.*

MANDAMUS—ELECTION COMMISSION—POWERS OF—RECALL PETITION—*State ex rel. Holmes vs. Peck et al.*—No. 13219—*Decided February 6, 1933—Opinion by Mr. Justice Moore.*

1. Under Section 276 of the Charter, the Election Commission of the City and County of Denver has quasi-judicial power to hear and determine the sufficiency of a petition to recall an elective officer.

2. Mandamus is a proper remedy where it is charged that the Election Commission exceeded its power and abused its discretion, and that the recall petition had been tampered with after it was filed with the City Clerk. In the absence of certification to it of the entire record, the Supreme Court could not pass on the justice of such charges.

3. Mandamus will not lie to compel a quasi-judicial tribunal to exercise its discretion in a particular manner, unless its refusal to so act is the result of fraudulent or arbitrary conduct.

4. Failure of the trial court to specifically find the number of invalid signatures, and its refusal to compel the Election Commission to make such a finding, was not error.—*Judgment affirmed.*

APPELLATE PROCEDURE—RIGHT OF PLAINTIFF IN ERROR TO BILL OF EXCEPTIONS AT ANY TIME—POWER OF COURT REPORTER AND TRIAL JUDGE TO REFUSE SAME—VERIFIED STATEMENT IN SUPREME COURT IN LIEU OF BILL OF EXCEPTIONS—NECESSARY ALLEGATIONS OF VERIFIED STATEMENT—*Darwin T. Mason et al. vs. The Le Clair Mines Company et al.*—No. 13217—*Decided February 6, 1933—Opinion by Mr. Justice Burke.*

1. On Motion to Dismiss Writ of Error. Judgment was entered against plaintiffs on June 30, 1932, and they were given sixty days to prepare and tender a bill of exceptions. Plaintiff's requests for the bill were refused by the clerk and reported because of his inability to pay for same, and his time expired on August 30, no request having been made for an extension of time. On October 4th he again ordered the bill, asserting his ability to pay, but the reporter refused to prepare a Bill of Exceptions, informing him that the time had expired and a bill could not properly issue, and drawing in lieu thereof a "transcript of the testimony only." The judge, in later correspondence, refused to order the reporter to issue a Bill of Exceptions. The Writ of Error was issued when plaintiff filed his "verified statement," which he assumed to file under Supreme Court Rule 22.

2. A court reporter is duty bound to prepare a bill of exceptions at any time it is ordered and paid for, and to tender it to the judge.

3. When the court reporter's refusal to prepare the bill is brought to his attention the judge must direct the reporter to prepare and tender such bill.

4. The clerk and reporter are not obliged to prepare a bill of exceptions unless assured of payment.

5. Plaintiff in error, in his verified statement filed under Rule 22 of the Supreme Court, must show that he made a timely application to the trial court for an extension of time for the bill of exceptions, or must show sufficient reason for failure to do so. Inability to pay for the bill of exceptions is not sufficient reason.—*Writ of error dismissed.*

DISBARMENT—PROCEEDINGS IN—No. 12543—*The People vs. Kelley —Decided February 6, 1933—Opinion by Mr. Justice Moore.*

1. The charges, having been unsupported by the evidence, are dismissed.

PRIVATE CARRIERS—STATUTES REQUIRING LICENSING OF MOTOR VEHICLES OPERATED FOR COMPENSATION OR HIRE—APPLICATION TO PRIVATELY-OWNED TRUCKS TRANSPORTING CARRIER'S OWN GOODS FOR SALE AT PROFIT—CONSTITUTIONALITY OF PROVISIONS NOT COVERED IN TITLE—*The People of State of Colorado vs. Montgomery*—No. 13178—*Decided January 30, 1933—Opinion by Mr. Justice Moore.*

1. Action brought by the attorney general at request of the Public Utilities Commission to enjoin defendant from hauling for sale at a profit his own coal in his own motor trucks over the public highways of the state from the place of purchase to the place of delivery and sale unless he secure a permit to operate as a private carrier and otherwise comply with Chapter 121, Session Laws of 1931.

2. That portion of the 1931 laws which includes "all persons or corporations operating their own motor vehicles for the transportation of their own property, goods or merchandise, who charge or collect from the consignee, purchaser or recipient * * * compensation for transporting or delivering same" is unconstitutional because it embraces a subject which is not expressed in the title of the act.

3. A title of an act reading: "An act providing for the regulation of the use of public highways and of persons, firms, corporations and associations owning, controlling, operating or managing motor vehicles used in the business of transporting persons or property for compensation or hire, as private carriers by motor vehicle, upon the public highways of this state, * * *" does not cover provisions in the act applying to persons who haul their own property in their own vehicles for the purpose of selling the same at a profit.—*Judgment affirmed.*

DIVORCE—PROCEEDINGS TO VACATE FINAL DECREE—LACHES—CONSTRUCTIVE REQUEST FOR OR RATIFICATION OF DECREE—PUBLIC POLICY—*James Jensen vs. Hildur Jensen*—No. 12833—*Decided January 23, 1933—Opinion by Mr. Justice Burke.*

1. In January, 1924, Mrs. Jensen obtained a preliminary decree of divorce on grounds of desertion. Later she determined not to obtain the final decree, but the final decree was obtained by her husband in 1925, under Chapter 90 of the Laws of 1925. In March, 1929, Mrs. Jensen learned that the Colorado Supreme Court had held the 1925 law unconstitutional and divorce decrees obtained by guilty parties thereunder illegal, and in 1931, after remarriage of her former husband, commenced proceedings to vacate the decree of divorce. The decree was vacated by the district court.

2. Mrs. Jensen is presumed to have known the law in 1924, and her silence and acquiescence in the decree for more than five years after it was obtained was equivalent to a request on her part, or a ratification of a request made in her behalf, for the final decree.

3. After remaining silent when duty required her to speak Mrs. Jensen will not be heard when public policy requires her silence.—*Judgment reversed and cause remanded with instructions to dismiss.*

FRAUD—IN SALE OF REAL PROPERTY WHEN—VERDICTS—SET ASIDE WHEN—*Keeney et al. vs. Angell et al.*—No. 12825—*Decided February 6, 1933—Opinion by Mr. Justice Campbell.*

1. A finding of fact by the jury as to the existence of fraud in a real estate deal, when based upon conflicting evidence, will not be disturbed upon appeal.

2. Interest is not recoverable in an action for damages occasioned by fraud and deceit. A verdict, in such an action, which does include interest, will be set aside only as to the interest if it is free from error in other respects.—*Judgment modified and affirmed.*

EXECUTORS—UNLAWFUL APPROPRIATION OF FUNDS BY—APPEAL FROM JUDGMENT OF PROBATE COURT — LIMITATION OF SUBJECT MATTER ON APPEAL TO DISTRICT COURT—*Bessie B. Smith vs. Estate of Franklin P. Smith et al.*—No. 13238—*Decided February 6, 1933—Opinion by Mr. Chief Justice Adams.*

1. Plaintiff in Error was formerly executrix of the estate of her husband, deceased. The county court found that while so acting she unlawfully appropriated the sum of $1232.44 to her own use, and ordered her to return it to the estate. On appeal to the district court she sought to enlarge the subject matter of the appeal by seeking to prove a setoff in the amount of $5950 for alleged advances or loans to the court without a court order therefor.

2. Evidence on appeal to the district court must be limited in its purpose to the question involved in the judgment appealed from.

3. A judgment upon any question, either of law or fact, determined by the county court in probate matters may be appealed to the district court, without interrupting the proceedings as to the other matters not appealed from.—*Judgment affirmed.*

NEGLIGENCE PLEADINGS PROOF—*Herbert Drumright et al. vs. G. M. Goldberg*—No. 12778—*Decided February 20, 1933—Opinion by Mr. Justice Bouck.*

1. The paragraph of plaintiff's third amended complaint, which charges defendants with negligence is as follows: "That when the defendant Drumright reached the intersection . . . he negligently, carelessly and in reckless disregard of the rights of the plaintiff turned his truck from a southwesterly direction to a southerly direction, *without giving any signal of his intention of so doing,* and forcibly collided with plaintiff, etc. . . ."

2. Neither the abstract of the record nor the record itself shows any attempt on defendant's part, by motion or special demurrer or otherwise, to have the original complaint or any amended complaint made more specific or certain. Therefore evidence tending to prove any specific negligence, though not plead, was proper within the limits of the general allegation of negligence.

3. The findings and judgment having been reached upon conflicting evidence, both on the issue of defendant's negligence and on that of plaintiff's contributory negligence, the decision of the lower court is binding upon us.—*Judgment affirmed.*

CONTRACTS—FOR COLLECTION AND CONTINGENT FEE—RIGHT TO ENFORCE—DUTY OF AGENT TO INFORM SOLICITED THIRD PERSONS OF AGENT'S INTEREST IN COLLECTION—FAILURE TO SO INFORM DESTROYS AGENT'S RIGHTS AGAINST PRINCIPAL—*E. G. Davis vs. J. B. Bartlett*—No. 13242—*Decided February 20, 1933—Opinion by Mr. Justice Burke.*

1. Mr. Davis' automobile was wrecked because of carelessness of men working on public highway. Thereafter, while a bill was pending before the legislature for relief on account of his loss, Davis employed Bartlett to collect the claim for a contingent fee of 25% of any amount collected. Bartlett employed attorney Stewart to assist him, and Bartlett, Stewart and Davis talked to members of the state finance commitee in behalf of the claim. The relief bill was passed, appropriating $800, and Davis received the money.

2. Whether or not such contracts are enforceable, plaintiff held not entitled to recover because no evidence showed that he or Stewart had disclosed to the legislative committee members the fact that they would receive compensation contingent upon the passage of the bill. —*Judgment reversed.*

REVENUE—TAX EXEMPT PROPERTY—RIGHT TO ENJOIN TREASURER FROM SALE OF—*W. D. Grisard as Treasurer, etc. vs. Roselawn Cemetery Association*—No. 12806—*Decided February 27, 1933—Opinion by Mr. Justive Burke.*

1. The cemetery association brought suit to enjoin the County Treasurer from selling its property for unpaid taxes, claiming exemption. The treasurer demurred to the complaint and answered denying the claimed exemption and alleging that the association had a plain, speedy and adequate remedy at law.

2. Where property specifically exempt is involved, and relief is sought from clouded titles and continuing assessments, the complainant is not obliged to follow statutory procedure for relief at law, but may ask equitable relief.—*Judgment affirmed.*

WATER RIGHTS—CONVEYANCE—CONSTRUCTION—MANDAMUS—*Terrace Irrigation District vs. Braiden*—No. 12844—*Decided February 27, 1933—Opinion by Mr. Justice Campbell.*

1. Respondents' predecessor in title to an irrigation system conveyed a water right by deed to the State Board of Land Commissioners. Respondents should not now be heard to contend that said Board could not receive such conveyance, or in turn convey the water right to another.

2. Impossibility of performance, where such impossibility is due to acts of the respondents during pendency of the action, will not constitute a ground for refusing to issue a writ of mandamus.

3. Water right deed construed and held to convey the right to designate the land to be irrigated, as well as the right to change such designation.

4. Where trial of the action was delayed for several years by unsuccessful efforts toward settlement, court could permit an amendment of the alternative writ so as to ask for future relief.

5. Mandamus is a proper remedy to compel the delivery of water for a series of years or for an indefinite period of time.—*Judgment affirmed.*

PLEADING—DEMURRER—DEFECT OF PARTIES—AMENDMENT—*Terrace Irrigation District vs. Neff*—No. 12855—*Decided February 20, 1933*—*Opinion by Mr. Justice Hilliard.*

1. In a suit by a ditch owner against the water commissioner, a demurrer to the complaint for defect of parties will be sustained where the complaint calls for an interpretation of the decrees of other ditch owners.

2. Where plaintiff elected to stand on its complaint and final judgment was entered against it as a matter of course, the trial court may vacate such judgment in its discretion, plaintiff promptly moving to that end, and grant plaintiff leave to join other parties by amendment.—*Judgment affirmed.*

VAGRANCY—*J. A. McIntosh vs. City and County of Denver*—No. 13243—*Decided February 27, 1933*—*Opinion by Mr. Justice Butler.*

1. McIntosh was charged with vagrancy in the Denver Police Court. He was found guilty and fined fifty dollars. He appealed to the County Court where he was found guilty and sentenced to thirty days' imprisonment in the county jail.

2. "On review, the record is viewed in the light most favorable to the party successful in the trial court, and every inference fairly deducible from the evidence is drawn in favor of the judgment. . . . giving the City and County of Denver the full benefit of the rule stated above, we find, after painstaking examination of the record, that the evidence is wholly insufficient to sustain the charge.—*Judgment reversed, with instructions.*

LIMITATIONS OF ACTIONS—IN LAW—IN EQUITY—No. 12826—*Littlejohn vs. Grand International Brotherhood of Locomotive Engineers*—*Decided February 20, 1933*—*Opinion by Mr. Justice Burke.*

1. Plaintiff sought an injunction against an alleged conspiracy to defraud him of "seniority rights" and also sought compensatory and

exemplary damages. Demurrers to the complaint, raising the six and three-year statutes of limitations, were sustained. Demurrers for want of fact and non-joinder of parties were overruled. Judgment of dismissal was entered. The complaint was not filed until more than seven years after the plaintiff discovered his cause of action arising out of the alleged conspiracy.

2. When an action is based upon fraud, and the prayer seeks injunction and damages, both compensatory and exemplary, the action will be deemed one at law. "In such a case, where courts of law afford relief the jurisdiction is concurrent." . . . "But he also demanded exemplary damages in the sum of $25,000 and exemplary damages are not recoverable in equity." . . . "The same is true as to body execution."

3. The compiled laws provide that whenever there is concurrent jurisdiction in the courts of common-law and in courts of equity, the statute of limitations limiting the time within which suits can be brought in a common-law court, applies for the same cause in a chancery court.

The six-year statute bars actions of "assumpsit, on the case, founded on any contract or liability, express or implied. The three-year statute bars actions on the ground of fraud. The plaintiff cannot escape from the three-year statute.—*Affirmed.*

REAL PROPERTY—QUIET TITLE SUITS—MORTGAGE LIENS—LIMITATION OF ACTIONS ON—No. 13184—*Birkby et al. v. Wilson et al.*—*Decided February 20, 1933*—*Opinion by Mr. Justice Moore.*

1. Action to quiet title. Plaintiff held possession under a void tax. Defendant's rights were based upon a mortgage, unpaid and in default. The note secured by defendant's mortgage was more than six years past due at the time the suit was started.

2. Prior to S. L. '27, Colorado law gave a six-year statute of limitations on notes. In the act of '27 it was provided that, "No lien upon real property created by mortgage trust deed or other instrument in writing, securing the payment of an indebtedness, shall remain a lien for a period longer than seven years after the last or final payment of the principal of the indebtedness, or the last installment thereof secured thereby, is due and payable . . ."

The act also provides that mortgages, trust deeds, etc., of record at the time the act became effective, which were past due, "shall . . . be considered as becoming due at the time this act goes into effect and the time for payment may be extended within seven years thereafter, . . ." At the time the act of 1927 went into effect, the defendant's mortgage would have become barred by the statute on December 1, 1930. Under the terms of the act, however, the mortgage came due as of the date of passage, March 28, 1927; and subject to a seven-year extension from that date. In other words, action on the mortgage was not barred until March 28, 1934.—*Judgment affirmed.*

INJUNCTION—FAILURE TO GIVE STATUTORY BOND UNDER SECTION 165, CODE—*Roe vs. Stanley Fruit Co.*—No. 13253—*Decided February 14, 1933—Opinion by Mr. Chief Justice Adams.*

Stanley Fruit Company sued Roe for a specific performance and to procure an injunction. Plaintiff obtained an ex parte temporary restraining order and did not give bond for a specific amount as required under Section 165 of the Code, but a bond against damages that might be suffered if the temporary writ was improvidently issued.

1. The bond for temporary restraining order did not fulfill the requirements of Section 165 of the Code. The bond as given was not conditioned for the payment of the principal of the bond, but was only conditioned to pay costs and damages that might be awarded.

2. Section 165 of the Code provides for the giving of a bond, penal in character, whereby one applying for a temporary restraining order agrees to pay the specific sum mentioned in the bond in the event that it should be adjudged that an emergency did not exist for the issuance of the temporary restraining order, or that the plaintiff created or connived at the creation of the emergency.

3. Where a bond is given on a temporary restraining order conditioned to pay costs and damages and is not given in compliance with section 165, the Court did not err in refusing to enter judgment for the penalty of the bond.

4. Had the defendant applied in apt time for an order on the plaintiff to execute a proper bond there might be a different question involved, but under the facts in this case, the Court did not err in refusing to enter judgment.—*Judgment affirmed.*

CRIMINAL PROCEDURE—CONSPIRACY—MISJOINDER OF COUNTS—VARIANCE—RIGHT OF SEPARATE TRIAL BECAUSE OF REPUTATION OF CO-DEFENDANTS—INSTRUCTIONS—ORDER OF PROOF—ADMISSION OF EVIDENCE OF KNOWLEDGE OF ONE DEFENDANT—*Chris Mukuri and Joe Petrialia v. The People of the State of Colorado*—No. 13130—*Decided March 6, 1933—Opinion by Mr. Justice Burke.*

1. Plaintiffs in Error and others were convicted of conspiracy to burn the house of Jennie Carlino and of conspiracy to burn the same house with intent to defraud the insurers thereof. Identical sentences were pronounced on both counts, to run concurrently.

2. Assuming, but not deciding, the correctness of defendants' contention that the information improperly joins counts for conspiracy to commit common law and statutory arson, and that the second count is defective for failure to allege that the defendants knew the house was insured, no prejudice is shown.

3. Whether the motion for a directed verdict as to the second count should have been sustained is immaterial, because, identical sentences having been pronounced to run concurrently, the defendants were not prejudiced.

4. Defendants' tendered instruction to caution the jury against giving additional weight to the testimony of a government employee was properly refused.

5. Evidence that the house in question was mortgaged, a fact not mentioned in the information, does not constitute a variance, under Section 7103, Compiled Laws 1921.

6. A variance which does not tend to prejudice substantial rights of defendant is not fatal.

7. Defendants of good reputation have no right to a separate trial because of bad reputation of co-defendants. Such a matter rests in the sound discretion of the court.

8. Circumstantial evidence to show knowledge and preparation of one defendant is admissable against all the defendants, no prejudice having been shown.

9. Error in admitting, before the conspiracy was established, evidence of statements made by two other defendants out of the presence of these defendants, and implicating these defendants in the conspiracy, was corrected by subsequent testimony of similar statements made in the presence of these defendants, and by evidence clearly showing that the conspiracy had, at the time in question, been formed and that these defendants were members of and participating in it.

10. Order of proof rests in the sound discretion of the court.—*Judgment affirmed.*

CONTRACTS—CONSTRUCTION BY PARTIES—RENTALS—FORM OF PAYMENT—*Hinkle vs. Blinn*—No. 12728—*Decided March 6, 1933*—*Opinion by Mr. Justice Hilliard.*

1. The conduct of the parties before the controversy arose, acting under the contract, is a reliable test of their interpretation of the instrument.

2. Where a lease provided for payment of rent in the form of farm produce, and the lessee is able and willing to deliver the specified produce in payment of the rent, which is refused by the lessor, the lessor may not thereafter recover a money judgment for the rent.—*Judgment reserved.*

GUARANTY—RIGHTS BETWEEN GUARANTORS—CONTRIBUTION—*Taylor et al. vs. Hake et al.*—No. 12729—*Decided March 6, 1933*—*Opinion by Mr. Justice Butler.*

1. Plaintiffs and defendants were co-guarantors on an obligation of the Lafayette Farmers Union Elevator Company. When the company became insolvent, more than $18,000 still being due the bank, its business was taken over by a new company, The Lafayette Farmers Milling and Elevator Company, and the debts of the old company were assumed by the new. The new company, being unable to make the business pay, and in an effort to save something, traded the property for some land in Weld County; to do this it was necessary that the plaintiffs reduce the indebtedness to the bank of $9,000, which they did from their own pockets. Later the Weld County land was traded for

some Denver property. At the time of the latter trade, the plaintiffs received $1,000 as part consideration for the trade and this money was spent for paying taxes, commissions, etc., on the Denver property. The complaint asks for the proportionate share due by the defendants under the guaranty contract.

2. In an action for contribution between guarantors, the complaint need not state the amount, definitely, demanded from the defendants. Many times, as here, the amount which one guarantor owes is dependent upon the contingencies of the suit.

3. No allegation that a guarantor has paid more than his proportionate share is necessary when it is alleged that a contract of guaranty was signed by seventeen and paid by only four.

Many other contentions are advanced with which the Court did not agree.—*Judgment affirmed.*

BANKS AND BANKING—INSOLVENCY—LIABILITY FOR RECEIVING ASSETS IN CONTEMPLATION OF INSOLVENCY—*Walther vs. McFerson et al.*—No. 13189—*Decided March 13, 1933—Opinion by Mr. Justice Burke.*

1. The Banking Commissioner brought this action against Walther to recover assets of the Ridgway Bank, which, it was alleged, Walther had received from the cashier of the bank in contemplation of its failure, with knowledge and with intent to prevent the application of such assets to the bank's liabilities. The court below rendered judgment for the Bank Commissioner. Defendant prosecutes error.

2. Where one makes a loan from a state bank with the purpose to deceive the State Bank Commissioner in the performance of his official duties, such loan is contrary to public policy and void.

3. No bank shall sell, assign, or transfer any of its assets when insolvent or in contemplation of insolvency with the intention of preferring any creditor or preventing the application of such assets to the satisfaction of its debts.

4. A bank shall be deemed insolvent when the actual cash market value of its assets is insufficient to pay its liabilities other than its own capital stock, surplus and undivided profits, or when it is unable to meet the demands of its creditors in the course of its business.—*Judgment affirmed.*

JUDGMENT—SETTING ASIDE—DISCRETION OF COURT—*Lewis vs. Vache*—No. 13272—*Decided March 20, 1933—Opinion by Mr. Justice Burke.*

1. Plaintiffs below were husband and wife. Defendant below had judgment which was rendered in the absence of plaintiffs below on stipulation of counsel.

2. Where an attorney of record enters into a stipulation for rendition of judgment in compromise of a cause of action without the specific consent of his client, such stipulation is unwarranted and is not basis for a judgment.

3. An attorney may not compromise his client's case without express authority.

4. When confronted by an emergency where prompt action is required to protect his client's interests and consultation is impossible, the attorney may compromise.—*Judgment reversed.*

HOMESTEAD EXEMPTIONS—FORECLOSURE OF MORTGAGE—*Bean vs. Eves*—No. 12799—*Decided March 13, 1933—Opinion by Mr. Justice Hilliard.*

1. Suit to enjoin foreclosure of a trust deed and to establish a homestead exemption. Court below dismissed action.

2. The property involved was purchased by husband of plaintiff below, and as part of the purchase executed and delivered a note to defendant. Suit brought before public trustee to foreclose and subsequent to foreclosure by public trustee, plaintiff below, wife of mortgagor, filed homestead exemption.

3. A general lien created by filing a transcript of judgment must yield to an intervening homestead entry.

4. But where a homestead entry is filed subsequent to the filing of a legal lien, the homestead entry must yield to such preceding lien.—*Judgment affirmed—Justice Campbell dissents.*

SALES—UNAUTHORIZED ASSIGNMENT—AUTHORITY OF AGENT—*MacMarr Food Corp. vs. The Jagger Produce Co.*—No. 12907—*Decided March 20, 1933—Opinion by Mr. Justice Moore.*

1. The Sherman Mercantile Company sued The Jagger Produce Company to recover possession of eggs. Judgment entered for defendant upon directed verdict, which was reversed by the Supreme Court, and new trial ordered because there was ample evidence to carry the case to the jury. Thereafter, the MacMarr Food Corporation, successor of plaintiff below, was substituted as plaintiff. Second trial resulted in verdict for defendant.

2. To constitute a sale, there must be mutual consent of the parties. In this case, there was none.

3. Acts performed in ignorance of the true facts do not constitute ratification.—*Judgment reversed.*

TAXES—SALE—TAX SALE—PLEADING—*Fraser vs. Collins*—No. 12810—*Decided March 13, 1933—Opinion by Mr. Justice Campbell.*

1. Fraser was the record owner of certain lots which went to tax sale. She brought this action against the Treasurer and joined as defendants the purchasers of the real estate from the Treasurer. The tax sale was made November 6, 1921. There being no bidder, the County bought it in and in 1924, the County Treasurer assigned the tax sale certificate to the defendants, and thereafter the defendants brought suit to quiet their title and named the plaintiff as a party de-

fendant, and sufficient service was had on the defendant in the quiet title suit. The present suit was brought subsequent to the decree quieting title. Proper service was had by publication in the quiet title suit.

2. It is wholly immaterial in this case whether the attack upon quieting title is direct or collateral. Where proper service was had upon a defendant in a prior quiet title suit, such judgment is final.

3. Such decision is conclusive against a subsequent attack on the judgment.—*Judgment affirmed.*

CRIMINAL LAW—MOTION TO DISMISS WRIT OF ERROR—FAILURE TO PRESERVE RECORD IN BILL OF EXCEPTIONS—*The People vs. Bristol et al.*—No. 13230—*Decided March 13, 1933—Opinion by Mr. Chief Justice Adams.*

1. Defendants moved to dismiss writ of error. The district attorney filed information against directors of building and loan association charging them with violation of certain provisions of the statute, among other things, in failing to make semi-annual report as required by Section 2801, C. L. 1921. Defendants filed motion to quash, sustained below. District attorney brought review proceedings, but failed to incorporate the evidence.

2. Court of review, under such proceedings, will not recognize a statutory defect not apparent on the face of the act as published in the session laws, but which defect is dependent upon evidence aliunde not preserved in the bill of exceptions.

3. Judicial notice will not be taken of legislative journals.

4. Where the district attorney in suing out a writ of error fails to incorporate in the bill of exceptions the evidence, it is impossible for the reviewing court to determine whether the proof was or was not sufficient to warrant the findings below.—*Writ dismissed.*

SALES—SPECIFIC WARRANTY—IMPLIED WARRANTY—SALE OF SEED —*The Rocky Mountain Seed Co. vs. Knorr*—No. 13195—*Decided March 13, 1933—Opinion by Mr. Justice Hilliard.*

1. Action was originally before a Justice of the Peace. Judgment for defendant on counter-claim. Case was appealed to the County Court. Judgment on counter-claim in County Court. Plaintiff below was engaged in the retail seed business; defendant, a farmer. In the Spring of 1929, defendant purchased seed from plaintiff, and among other seed, bought alfalfa seed. Defendant was not an expert judge of seed and planted seed, and the seed turned out to be clover seed instead of alfalfa.

2. Where seller of seed attempts to restrict warranty of quality or kind by inserting on seed order or package of seed delivered that the seller gives no warranty, express or implied, as to the description, quantity, productiveness or any other matter of any seeds, bulbs or plants we send out and will not be in any way responsible for the

crop, such contract is not available to the seller unless specifically assented to by the purchaser.

3. Such written warranty is not applicable where the seller of seeds sells to the purchaser sweet clover seed where the purchaser ordered alfalfa seed.

4. In such a case, a warranty as to description, quantity, or productiveness is not broad enough to include a mistake of the seller in delivering the wrong kind of seed, such as a delivery of clover seed where alfalfa seed was ordered, and in such case, such written warranty has no applicability.—*Judgment affirmed.*

JUDGMENTS—FOREIGN—PLEADING—SUFFICIENCY—*Gobin vs. Citizens State Bank*—No. 12847—*Decided March 20, 1933*—*Opinion by Mr. Justice Campbell.*

1. Citizens State Bank brought suit against Gobin and Gobin, based on judgment of District Court of Sedgwick County, Kansas. Judgment below for plaintiff.

2. In pleading a judgment or other determination of a Court, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.

3. In a petition, it is not sufficient to allege that the plaintiff recovered a judgment. The allegation must be made that such judgment was duly made or given.

4. In order that an action may be maintained in one state upon a judgment recovered in another state, it is necessary that the judgment should be a valid and final adjudication remaining in full force and virtue in the state of its rendition and capable of being enforced by final process.

5. A judgment of a sister state cannot be impeached for fraud.

6. Where a judgment of a sister state is attacked for fraud, resort must be made to the Court that rendered the judgment except in cases where the original court would itself allow the defense of fraud in an action on the judgment.—*Judgment reversed.*

REPORT OF NOMINATING COMMITTEE

The Committee on Nominations of the Denver Bar Association submitted the following names of candidates for election at the annual meeting April 20th next:

For president, Fraser Arnold.

For first vice president, Percy S. Morris.

For second vice president, Fred Sanborn, Jr.

Trustees, Harry S. Silverstein and Golding Fairfield.

WILLIAM E. HUTTON, *Chairman.*

TRUST BANKING

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